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No. 196

In the Supreme Court of the United States

OCTOBER TERM, 1941

H. W. FERGUSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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PETITION FOR REHEARING.

Comes now your petitioner, H. W. Ferguson, and prays reconsideration of his petition for certiorari to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on May 6, 1941, affirming the judgment of the United States District Court for the Northern District of Texas.

This petition for rehearing is filed because it is believed that the petition for certiorari failed adequately to present, and this Court has overlooked, a novel and egregious error of law committed by the United States Circuit Court of Appeals which has deprived petitioner of his constitutional

right to a fair trial. This decision, if left uncorrected by this Court, will clearly impair and discredit in large part the statutory right to appellate review for the correction of errors by district courts. Because the effect of the decision is merely to substitute for the right of a fair trial by jury the barren right to two trials, the case presents a proper occasion for the exertion by this Court of its supervisory power.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 528-30) is reported in 119 F. (2d) 582. The opinion of the same court on prior appeal is reported in 112 F. (2d) 132.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on May 6, 1941 (R. 530). Petition for rehearing was denied by the Circuit Court of Appeals on May 31, 1941 (R. 556). Petition for certiorari was filed on June 20, 1941, and was by this Court denied October 13, 1941.

Question Involved.

Defendant, a president of a joint stock land bank, was accused of abstraction and conversion of funds of the bank in collecting the income and proceeds of land transferred by a debtor of the bank to a nominee who, defendant asserted, took title for defendant's wife, and who, the Government asserted, took title for the bank. The sole issue was this question of ultimate fact—For whom did the nominee hold title. The trial court's instructions to the jury on the first trial were held erroneous by the Circuit Court of Appeals in that they forced on the jury the impression that, because of the defendant's official position, the deed could have been only to the nominee S. K. Fowler as trustee for the land bank.

The question is whether the Circuit Court of Appeals erred in holding that on the new trial, the district court, although repeating the same erroneous instructions either verbatim or in essential substance, nevertheless preserved to petitioner his right to a jury trial by merely adding, at the conclusion of its very lengthy statement, new but necessarily inoperative admonitions that petitioner was not to be found guilty if:

1. He collected the moneys arising from the land in good faith believing that they were the property of his wife, or

2. The Government had failed "to prove beyond a reasonable doubt that at the time the land in question herein went into the name of S. K. Fowler, that it was H. W. Ferguson's intent and purpose that same should at that time be held thenceforth by him as trustee for the land bank".

Statute Involved.

Section 31 of the Federal Farm Loan Act, c. 245, 39 Stat. 360, 382 (12 U. S. C., sec. 984) provides:

> Any person connected in any capacity with any * * * joint stock-land bank, who embezzles, abstracts, or wilfully misapplies any moneys, funds, or credits thereof * * * with intent * * * to defraud such institution * * * shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding five years, or both.

Statement.

The facts are here summarized for petitioner believes that they have never been adequately presented to this Court, and also because their statement casts into sharp relief the error of law committed by the trial court. This error has prevented the jury from passing upon the only

vital issue involved and, consequently, has prevented petitioner from receiving a fair trial.

On September 18, 1939, petitioner, together with one Craddock, was indicted in the United States District Court for the Northern District of Texas. The indictment was in six counts and charged petitioner with conspiracy to violate, and violation of, Section 31 of the Federal Farm Loan Act (12 U. S. C. Sec. 984), by abstracting and converting to his own use moneys belonging to the Dallas Joint Stock Land Bank, of which he was president (R. 1-11). The first count was stricken. The next four substantive counts referred to sums received as oil-lease bonus, earnest money, additional purchase money, and crop rent. The last was a conspiracy count.

The Circuit Court of Appeals reversed the judgment on the first trial on the ground that the instructions of the trial court had in effect dictated the verdict and deprived petitioner of a jury trial. *Ferguson* v. *United States,* 112 F. (2d) 132 (C. C. A. 5). On retrial but upon instructions partially identical in form with those disapproved and altogether identical in effect, there was a second verdict of guilty. Petitioner was sentenced generally on all counts to imprisonment for 18 months and a fine of $10,000 (R. 14-16). The Circuit Court of Appeals affirmed (R. 530).

In pertinent substance the uncontradicted facts were:

Ferguson, throughout the 20 years of the Bank's existence, had been its able president. He exercised almost complete control over the bank's business (R. 403, 60-64).

In 1937 the bank held the mortgage note of Carrie Berkman secured by a mortgage on her farm in Nueces County, Texas (R. 29, 90, 91). The loan had become hopelessly delinquent; including taxes these delinquencies totaled approximately $2,200 (R. 25, 54, 59, 75, 413). Attempts to make collection had proved futile (R. 13, 22, 399). In this

situation the secretary-treasurer on March 13, 1937, requested the bank's attorneys to make collection (R. 25).

The Offer of the Debtor.—The debtor offered, but on March 16, 1937, the bank refused to accept, surrender of the land for the debt (R. 28).

On March 17, 1937, the debtor, through her attorney, addressed to Chas. S. McCombs, the bank's attorney at Dallas, a new offer to surrender the land to the bank and to pay $1,000 in cancellation of the indebtedness (R. 32, 33).

Since the bank already held in excess of 2 million dollars worth of land (R. 44, 412, 415), when McCombs presented this letter to him Ferguson was faced with a problem (R. 415). He believed the land might in the future, as a matter of possible speculation, have a greater value (R. 418). But he did not want the bank to acquire more real estate and in particular did not wish to take this land onto the books of the bank since its sales value did not equal the amount of the debt against it (R. 414). After applying on the loan's delinquencies the $1,000 payment Mrs. Berkman offered, there remained, if the loan were to be placed in current standing, approximately $1,200 additionally delinquent, including principal, interest, and taxes (R. 419, 420). The funds of Ferguson's wife were in the market for investment. If she took the land and paid up the taxes and paid all delinquent principal and interest, the bank, while obtaining substitution of no new personal responsibility, would avoid putting any more land into its real estate account. To the positive benefit of the bank, the loan would be put in current standing and the bank would be saved the expense of taxes and possible upkeep expense (R. 413, 414, 415). Not only would the bank thus avoid speculation—which it was of course Ferguson's duty as president to avoid—but it would, by virtue of the payment of $1,200 by Mrs. Ferguson, vastly improve the value of the security for its debt (R. 414, 417, 419, 420).

Actuated by these considerations, Ferguson told McCombs to make the debtor a counter proposition (R. 415, 417): That the bank would release the personal liability of the debtor in consideration of the payment of $1,000 to the bank, and Mrs. Ferguson would take over the land, put up the delinquent principal, interest and taxes, the deed to be to one Fowler for convenience (R. 415, 417).[1]

The Counter-proposition.—Pursuant to these instructions, the answer of McCombs dated March 25, 1937, did not accept the offer. It merely stated that

> after considerable discussion among *the officers* of our client *they* have decided to make you this *counter proposition.* (Emphasis supplied.)

The stated counter offer was that if Mrs. Berkman would convey the property free and clear of all liens to a *nominee of the land bank* and pay $1,000, the land bank would release her of personal liability on the note (R. 33, 34) [2]. Ferguson never saw this letter, and did not authorize the language used by the lawyer McCombs (R. 417).

This counter proposition by the officers was accepted before April 5, 1937 (R. 35, 36, 37). The bank received the $1,000 from Mrs. Berkman (R. 42) and released her from

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[1] Fowler farmed for Ferguson a section of land near to the Berkman land (R. 407) and also was a large farm operator in the community (R. 417); and if a deal were made to sell the land, it would be convenient if Fowler there resident, rather than Mrs. Ferguson in Dallas, were the record owner (R. 417).

[2] Since the net result to the debtor was exactly the same as that contemplated by her in her offer, McCombs' reference to this as a counter proposition is accounted for only by the fact that this counter proposition is stated to come, not from the bank, but from *the officers,* and, therefore, that the nominee of the bank was to hold title for, not the bank, but the officers.

Such a counter proposition, if made on behalf of the bank itself, would have been unnecessary, for Mrs. Berkman had already offered to deed the land to the bank and pay $1,000 for release of personal liability. If the deed to a nominee of the bank was for the bank, there would have been no counter proposition, but an acceptance of Mrs. Berkman's offer.

personal liability by release dated April 9, 1937 (R. 38). Mrs. Berkman executed a deed conveying the land to S. K. Fowler, dated March 30, 1937 (R. 83).[3] On April 29, 1937, Ferguson paid out approximately $800 of his wife's money and shortly afterwards in July, approximately $336 more, against the delinquent principal and interest due the bank and delinquent taxes, making an investment in the property of about $1,200 (R. 419, 420).

Action and Letters of Government's Witness McCombs Belie His Testimony as to Effect of Transaction.—Not to show conflict in evidence but to show what a very close case was presented, it is pertinent to note that all subsequent acts of McCombs and the bank's employees upon and after April 5, 1937, clearly established that title was not vested in the bank or its nominee:[4]

a. *No deed to bank as was uniformly required where nominee held for the bank.*—When McCombs had Mrs. Berkman convey to Fowler, he did not require that Fowler give a deed over to the bank as was always done by a nominee holding for the bank, and which deed over to the bank was required by Government regulation when a nominee held for the bank (R. 55, 305, 306, 460). Yet McCombs admitted that Fowler had never before been a nominee for the bank, did not work for the bank (R. 53), and, indeed, that McCombs had never heard of him before (R. 240).

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[3] Ferguson and Craddock testified Fowler was told beforehand, which Fowler did not deny (R. 417, 418, 324, 200).

[4] While property was frequently conveyed to the bank through a "nominee", the nominees always had been, thereafter continued to be, and were at the time of trial 2 years later, J. J. Marshall or Searcy Ferguson, employees of the bank (R. 52).

And in such transfers of land to the bank through these nominees, it was the uniform practice for the legal department immediately to secure from the nominees, and keep unrecorded in the files of the bank as a precautionary measure and upon instructions from the Federal Government (R. 53, 411, 460), another deed conveying the property over to the bank (R. 53, 411, 460, 378).

b. *The attorney instructed the bank's force that title to the property was in Fowler subject to the bank's lien.*—On April 5, 1937, he wrote a memorandum letter of instructions to the bank, with carbon copies indicating to the bank's employees the changes in the bank's records necessary to properly reflect the transaction. The memorandum states (R. 57):

> Title to this property is now in S. K. Fowler, Corpus Christi, Texas, subject to the lien in favor of the bank. We are closing our file on this item.

c. *The bank's records thereafter clearly showed that title was not held for the bank.*—In accordance with the instructions in this memorandum, J. J. Marshall, the bank's employee who first received the memorandum during its routing through the office, changed the bank's Individual Mortgage Loan Record to show title to the security to be vested in S. K. Fowler, of Corpus Christi, Texas (R. 303, 304, 305). Marshall testified that if, on the other hand, the property had been shown to be held in the name of a nominee for the bank, the land would have been placed in the Real Estate Account, and would not have been continued as an open loan on the Individual Mortgage Loan Record, as was done in this case (R. 315).

A clerk in the bank's tax department also received in the course of office routine McCombs' memorandum of instruction to the bank (R. 371). Had the memorandum indicated that Fowler held for the bank, the tax record of this property would have been transferred to the bank's Real Estate Account, showing the bank's future tax responsibility (R. 373, 375, 380). But because McCombs' instruction indicated to the employee that title was in S. K. Fowler, without the slightest intimation that he held for the bank, the bank's tax records were changed to show that title to the property was in S. K. Fowler and not the bank (R. 373, 378).

Thereafter, semi-annual maturity notices (R. 153) and tax statements (R. 68) were sent from the bank to Fowler.

The memorandum of instruction of McCombs, and the acts of the bank's employees in sole dependence thereupon, which reliance must necessarily have been contemplated by him, all recognize that title to the property had passed, not to the bank or to some one holding for it (R. 314, 315, 316), but to Fowler, holding title for himself or in trust for some one other than the bank (R. 380).

d. *By letter the bank's attorney recognized that Fowler did not hold title for the bank.*—On April 5, 1937, Chas. S. McCombs, attorney for the bank, wrote another letter concerning this transaction, this one to H. W. Ferguson enclosing the deed from Mrs. Berkman to Fowler (R. 56). In this letter he made the highly significant statement:

> If either you or Mr. Fowler wants an opinion from me as to *his title* let me know so that I may order the necessary documents and have them filed for record in Nueces County, and included in a supplement.[5]

e. *The bank's field agents in dealing with third parties clearly stated that the property was not that of the bank.*—During the week of April 8 to 15, 1937, Craddock and C. W. Riley, both fieldmen of the bank, went to the office of John G. O'Neal, President of the Wellington Oil Company (R. 221, 225). The purpose of the visit was to try to lease to that company two tracts of land in which the bank had an interest. Craddock, the brother of Mrs. Ferguson, also dis-

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[5] The attempted explanation by McCombs that sometimes a prospective purchaser wanted a letter from his firm that title was good, and that if Ferguson, the bank or Fowler wanted such letter he would give it to them (R. 258, 259), is conclusively rebutted by the fact that Marshall, a Government witness, one of the bank's regular nominees, and the employee charged with supervision of title records of the bank (R. 307), testified that such a letter was never received by him in relation to titles which the regular nominees held for the bank (R. 316).

cussed the leasing of the land here in question (R. 221, 225, 330). Craddock and Riley, when discussing the ownership of the three parcels of land with Mr. O'Neal, definitely stated that one belonged to S. K. Fowler, another to the Dallas Joint Stock Land Bank, and the third to a farmer named Melte (R. 224, 330). Craddock did not represent that the Fowler land belonged to the bank (R. 224, 225, 330). Instead, knowing that Fowler held title for his sister, he declared to Mr. O'Neal that this tract belonged to S. K. Fowler, and distinguished it from land belonging to the bank (R. 224, 225, 330).

Later, all three tracts were leased (R. 221), the lease on the Fowler tract being dated on April 28, 1937, but not being actually closed until May 10, or May 11, 1937 (R. 223). The Wellington Oil Company paid $2,400 for this lease (R. 223) which Ferguson put to his wife's credit. Absolutely no negotiations by Ferguson or Craddock to lease the Fowler land occurred prior to April 8 (R. 226). And O'Neal, Ferguson, and Craddock, all definitely established the fact that the oil company was not a prospect for the lease when Ferguson told McCombs that his wife would take title to the land through Fowler (R. 419, 329, 226).

Subsequently, in July (R. 117, 118, 119), the property was sold to a purchaser who assumed the mortgage and paid a total of $3,796 which Ferguson put to his wife's credit, together with the rent on the land for 1937 of $514 (R. 421).

f. *McCombs admitted in 1938 that the deed to Fowler was not in trust for the bank.* A year later in 1938 a Dallas lawyer named John Pope, who represented Ferguson (R. 287, 289), heard a rumor that Ferguson had illegally made some money out of the Berkman loan (R. 296), and was referred to McCombs by Ferguson (R. 288). McCombs at that time told Pope that the deal was all right, that he

knew all about it, that Fowler held the property in trust for Mrs. Ferguson (R. 288, 289, 299), and that, therefore, she received the oil and gas lease money from the Wellington Oil Company (R. 289). And upon cross-examination McCombs admitted that he told Pope the deed to Fowler "was not made in trust for the bank" (R. 262).[6]

Two years later, in 1939, Ferguson, on his sole responsibility, discharged McCombs, not only from a $17,000 per year retainer from the bank but also as his own lawyer (R. 406, 407). McCombs then sued Ferguson individually, dismissed and immediately refiled (R. 407).

On September 18, 1939, a few months after McCombs' discharge, the indictment in this case was filed (R. 1). And upon trial McCombs was the only Government witness who testified that the transaction was not made as Ferguson said (R. 252).

On this state of the evidence, it was clear that because the bank's loan was involved and it was dictating the terms of settlement with Mrs. Berkman, her grantee, whoever he might be, must necessarily be the nominee *of* the bank. The sole question for determination by the jury, therefore, was the narrow factual question: Whether Fowler in taking title from Mrs. Berkman as nominee of the bank took (1) as nominee *for* the bank—i. e. as agent or trustee to hold title for the Bank, or (2) as nominee to hold title for Ferguson's wife.

But the trial court, ignoring the strictures of the opinion of the Circuit Court of Appeals in reversing the first judgment, persisted in instructing the jury that Ferguson's

[6] In attempted explanation of these conversations with Pope, McCombs first testified that he told Pope he had prepared a deed to a nominee for the bank (R. 251, 252), but upon cross-examination he testified that he told Pope the deed to Fowler "was not made in trust for the bank" (R. 262). McCombs' attempted explanation of this latter statement, that he, at that time, had no apprehension there was anything the matter, is illogical and evasive. For there could not have been anything the matter were his statement to Pope true.

position of trust prevented any possibility of the land and the moneys arising from it belonging to anyone but the bank (R. 462-474).

Upon a verdict of guilty, petitioner received a sentence of 18 months imprisonment and $10,000 fine.

The Circuit Court of Appeals affirmed. 119 F. (2d) 582.

Reasons for Granting the Writ.

1. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT FERGUSON'S POSITION OF TRUST PREVENTED THE TRANSFER OF THE LAND FROM MRS. BERKMAN TO ANYONE OTHER THAN THE BANK OR A NOMINEE TAKING TITLE FOR THE BANK, THUS INVADING THE PROVINCE OF THE JURY AND TAKING FROM IT THE SOLE ISSUE IN THE CASE.

It may be conceded that Ferguson in attempting to deal with this property, with respect to which he acted in a dual capacity, was very ill-advised and, had the bank elected (as it did not) undoubtedly would be required to account in equity for the profits realized. cf. *United States* v. *Wise*, 108 F. (2d) 379, 382. But, as the Circuit Court of Appeals recognized in its first opinion, 112 F. (2d) 132, 134, criminal liability here in question depends on whether the land became the land of the bank in March, 1937, for if, on the contrary, the land in fact was that of Mrs. Ferguson after that date, the petitioner was clearly innocent in appropriating to her the moneys derived from it.

The error of the district court lies in its persistence, after being once corrected by the Circuit Court of Appeals, in instructing the jury that petitioner's position as president of the bank prevented the deed by Mrs. Berkman from vesting title in anyone other than the bank.

It is true that the court in exactly the same words as used at the first trial did correctly state the issue as follows (R. 464-465):

> When Mrs. Berkman conveyed that property, for the purpose of relieving herself of liability for her debt, was she conveying it to someone to take under control and direction by the bank, or was she conveying it to someone to have and to hold for himself, or someone else?

But this statement was lost in the court's repeated instructions—not only in his recitations of what the evidence showed but of fixed rules of law—impressing on the jury that because of Ferguson's position as President of the bank it was not possible for him to cause title to the land to be transferred from Mrs. Berkman to a trustee for Ferguson individually or for Mrs. Ferguson. This amply appears from the following (R. 463):

> In that situation she [Mrs. Berkman] offered to give the bank the land and $1,000 besides, if they would release her of the debt.
>
> The evidence shows, or tends to show, that the defendant, Ferguson, considered the land a fairly good
> "A" prospect, and *accepted* the proposition, and accepted it in this form: That instead of conveying the land *directly* to the bank, it was to be conveyed to a person to be named by the bank, called a nominee. That nominee was S. K. Fowler (R. 465). (Emphasis supplied.)
>
> He [Fowler] was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, for the bank or for the defendant Ferguson, or defendant's wife, Mrs. Ferguson. Somebody had to constitute him trustee, and he held the thing in trust for somebody.
> "B" The defendant Ferguson was President of the bank, and as such was *without power* to take anything that was the bank's and name somebody as trustee to hold it for him personally, or for his wife (R. 465). (Emphasis supplied.)

"C" If the defendant Ferguson took the land for the bank in Fowler's name, then the bank's equitable ownership of the land and its proceeds would not cease * * * (R. 466).

"D" One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own (R. 468).

The case turned upon whether the bank had accepted the offer of Mrs. Berkman or whether Mrs. Berkman had accepted the counter-offer of Ferguson. But, in item "A", although the case was a very close one, the court told the jury that the debtor "offered to give the bank the land", and that Ferguson "accepted the proposition" (viz., the giving of the land to the bank) with the modification that "instead of conveying the land *directly* it was to be conveyed to a person named by the bank, called a nominee". (Emphasis supplied.)

Paraphrased, but with no change in meaning, the court thus instructed the jury: "Mrs. Berkman offered to give the bank the land, which proposition was accepted, but the manner in which the property was deeded to the bank was indirect, rather than direct". Thus, at the very beginning the jury was instructed that Fowler took title to the land for the bank.

Here, as to the very crux of the case—the ultimate issue upon which the whole case solely pivoted—the court stated only the Government's testimonial evidence, omitting entirely petitioner's well-nigh conclusive documentary evidence which showed that the offer of Mrs. Berkman was not accepted—that a "counter-proposition" was made. (See R. 33, 34, referred to *supra*, p. 6.) This clearly violated the established rule that when a Federal trial judge undertakes to summarize the evidence at all, he may not state only the facts on one side of the issue but must be fair and adequately call to mind the evidenec of both sides. *Williams* v. *United*

States, 93 F. (2d) 685, 692, 693; *Cline* v. *United States,* 20 F. (2d) 494, 496; *Boatwright* v. *United States,* 105 F. (2d) 737, 739.

The prejudice here was aggravated because there was no substantial difference as to the other pertinent facts. This question of the nature of the agreement of the parties at the time of the deed by Mrs. Berkman was the single issue of ultimate fact upon which all depended. Therefore, it was particularly incumbent on the court, having once undertaken to summarize the evidence, to state the evidential facts presented by the defendant as well as the oral testimony of the Government's witness which, indeed, was more conclusory than evidentiary in nature.

But the other parts of the instructions above quoted make it clear that, even were the jury, despite the court's narration, to take another view of the evidence, the court's injunctions as to controlling principles of law effectually eliminated any remaining possibility that the jury might pass upon the fact issue presented.

The second sentence in item "B" *supra,* charging that Ferguson was President of the bank and as such was without power to take anything that was the bank's, while true in the abstract, must necessarily have been understood by the jury as meaning that the land, before it was deeded to Fowler, was the land of the bank and Ferguson therefore could not make Fowler trustee for Mrs. Ferguson. The Circuit Court of Appeals so held on the first appeal. 112 F. (2d) 132, 135.

And if there could have then remained in the mind of the jury any doubt that the land, even before the deed to Fowler, was to be regarded as the bank's it must have been conclusively removed by the further instruction (item "C"), *supra*:

> If the defendant Ferguson took the land for the bank in Fowler's name, then the bank's equitable ownership of the land and its proceeds *would not cease* • • •

The court thus clearly instructed that at all events, and before the transfer, there was an equitable ownership or title in the bank. Taking items "C" and "D" together and in view of item "B", it is difficult to imagine a more plain and direct holding that before the deed from Mrs. Berkman the equitable title to the land was in the bank and because it was in the bank Ferguson, being the President of the Bank, was without power to name some one to hold it for him personally or for his wife.

In view of the prior instructions, item "D", *supra,* directing that—

> One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own—

served only to emphasize to the jury that since the bank had equitable title to the property, Ferguson was not at liberty to cause it to be transferred to Fowler as nominee for Mrs. Ferguson.

In a case such as this where the evidence is close and the guilt of defendant highly doubtful, it is plain that any error of substance must of necessity grossly prejudice the defendant. *Starr* v. *United States,* 153 U. S. 114, 126; *Berger* v. *United States,* 295 U. S. 78, 88, 89; *Gold* v. *United States,* 26 F. (2d) 185, 186.

It is obvious that in instructing the jury that Ferguson was without power to cause the Berkman property to be transferred to a nominee in trust for Mrs. Ferguson, the court on the second trial clearly erred as a matter of law (as the Circuit Court of Appeals conceded on appeal from the judgment on the first trial) and effectually deprived the petitioner of his constitutional right to have the jury determine from all the evidential facts whether the nominee's title was held for Mrs. Ferguson at the time of receipt of the moneys here in question.

2. FOR PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY JURY—OF WHICH HE HAS BEEN PLAINLY DEPRIVED—THE CIRCUIT COURT OF APPEALS MAY NOT PROPERLY SUBSTITUTE A MERE RIGHT TO HAVE TWO TRIALS IN EACH OF WHICH THE ULTIMATE QUESTION OF FACT IS EFFECTUALLY TAKEN FROM THE JURY.

Petitioner recognizes that what to him is all important is not necessarily a question of such importance as to justify review by this Court.

Here, however, it is plain that the Circuit Court of Appeals at first vindicated the right of petitioner to a jury trial by pointing out specifically, and condemning, statements of the trial court which clearly took the sole fact issue from the jury. On the new trial ordered by the Circuit Court of Appeals, the district judge has lightly overruled the appellate court, and has given word for word the very instructions criticised by the appellate court. And now on appeal, the Circuit Court of Appeals has held that no right of petitioner has been impaired. Thus, petitioner is in the position of having expended large sums in pursuit of what it now appears was but a legalistic phantom. For his right to a fair trial—it now develops—is but a right to two trials. Having secured him that, the appellate court is no longer interested.

In thus abandoning its duty to protect petitioner's right to a jury trial, it is submitted that the Circuit Court of Appeals has so far departed from the proper course of judicial proceedings—at the same time sanctioning a departure by the lower court from the accepted and usual course of judicial proceeding—as to call for the exercise of this Court's power of supervision.

Instructions "A" and "B", above quoted, are, with change insignificant in effect, verbatim restatement by the trial court of two of the four instructions which were the specified ground for reversal on the first trial:

A.

First trial (112 F. (2d) 132, 134):

In that situation she [Mrs. Berkman] offered to give the bank the land and $1,000 besides if they would release her of the debt. The evidence shows that Mr. Ferguson—that the defendants, Ferguson and Craddock, considered the land a fairly good prospect, and *accepted* it in this form. That instead of conveying the land *directly* to the bank that they convey it to a person to be named by the bank, called a nominee, or for the bank. That nominee was S. K. Fowler. (Emphasis supplied.)

Second trial (R. 463):

In that situation she [Mrs. Berkman] offered to give the bank the land and $1,000 besides, if they would release her of the debt.

The evidence shows, or tends to show, that the defendant, Ferguson, considered the land a fairly good prospect, and *accepted* the proposition, and accepted it in this form: that instead of conveying the land *directly* to the bank, it was to be conveyed to a person to be named by the bank, called a nominee. That nominee was S. K. Fowler. (Emphasis supplied.)

The Circuit Court of Appeals, upon first appeal, commented: "Thus in the very beginning the jury were told in effect that Fowler took for the bank and not for Ferguson."

The second instruction similarly criticized but nevertheless repeated by the trial court was:

B.

First trial (112 F. (2d) 132, 134):

He [Fowler] was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, either for the bank or for the defendant Ferguson. Somebody had to constitute him trustee. He could not arrogate that to himself without his consent, or without his knowledge.

The defendant Ferguson was *without power* to take anything that was the bank's and name somebody as trustee to hold it for him personally. (Emphasis supplied.)

Second trial (R. 465):

He [Fowler] was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, for the bank or for the defendant's wife, Mrs. Ferguson. Somebody had to constitute him trustee, and he held the thing in trust for somebody.

The defendant Ferguson was President of the bank, and as such was *without* power to take anything that was the bank's and name somebody as trustee to hold it for him personally, or for his wife. (Emphasis supplied.)

Of this the Circuit Court of Appeals, on first appeal, said: "The last sentence while true of anything that really was the bank's would be understood, in the connection in which it was spoken, as meaning *the land before it was deeded to Fowler was the Bank's,* and Ferguson was therefore without power to make Fowler his trustee." (Emphasis supplied.)

Plainly, the petitioner in obtaining a new trial realized the form and was deprived utterly of the substance of a fair trial by jury.

While instructions "C" and "D" above quoted, p. 14, were new on the second trial, and therefore were not criticized on the first appeal, the fact of their addition by the trial court is pertinent because they so closely compare with, and force the verdict of the jury as much as, a supplemental instruction to the jury on the first trial which was the subject of criticism on appeal (112 F. (2d) 132, 135):

Supplemental instruction:	Upon second trial:
I instruct you in reply to that question,[7] gentlemen, that the defendant Ferguson acting as trustee for the bank did not have the right to convey the property to his wife. He did have the right, if the property was his, to give it to her, but he did not have the right as trustee for the bank to do so.	"C". If the defendant Ferguson took the land for the bank in Fowler's name, then the bank's equitable ownership of the land and its proceeds would not cease • • • (R. 466). "D". One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own (R. 468).

Of this supplemental instruction the Circuit Court of Appeals said: "If it "the property" meant the land at the time Fowler received it, it [the instruction] was wrong as applied to this case. We think it likely the jury intended it to mean the land, and thought the case ruled by the judge's answer, for they soon made a verdict."

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[7] The question of the jury was: "Did Ferguson, acting as trustee for the bank, have the right to convey this property to his wife through S. K. Fowler?"

We submit that the last part of the new instruction "C" plus the statement in "D" in so many words likewise told the jury that, even before the conveyance to Fowler, equitable ownership of the land was the property of the bank and, as president of the bank, Ferguson was not at liberty to deal with it as his own.

It is thus apparent that by retaining certain of the criticised instructions verbatim and in other instances by substituting new instructions of the same import the district court perpetuated the error and at the same time succeeded in vindicating the correctness of its instructions on first trial although they had been held erroneous by the Circuit Court of Appeals.[8]

Inoperative instructions.—Briefly dismissing petitioner's contentions of error on second appeal, the Circuit Court of Appeals reasoned and the Government in its Brief in Opposition, p. 10, 11, here argued that there was no error because the trial court had given two requests of the defendant which it said "stated the issues in a light most favorable to" him.

But these two issues:

(1) Whether Ferguson collected the moneys arising from the land in good faith believing that they were the property of his wife, and

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[8] It is not to be overlooked that on the first appeal the Circuit Court of Appeals said (112 F. (2d) 132, 134):

> But we think the court, impressed with Ferguson's accountability in equity as an agent and fiduciary of the bank, erroneously made and refused charges on the critical question.

Whether or not motivated by intent to make the same impression on, and thus influence, the jury on the second trial, it is pertinent to note that the trial court took occasion in the instructions on the second trial to add a statement on the unconditional civil liability of Ferguson to the bank—an instruction which, of course, had no relevance to the question at issue and could only serve to influence the jury against the defendant (R. 468).

(2) Whether Ferguson intended, at the time of the deed, that Fowler hold the land as trustee for the land bank, were not fairly before the jury.

Whether from bias or ingenuousness, the trial court had already erroneously instructed the jury that Ferguson *accepted* Mrs. Berkman's proposition to deed the land to the bank, and further that Ferguson was *without power* to make Fowler his wife's trustee; further, that Ferguson was civilly liable to the bank (R. 468); that the bank's equitable ownership of the land existed before the deed to Fowler, and further, that Ferguson, the President, could not deal as though it were his own with property of the bank (meaning the bank's equitable ownership of the property in question).

Obviously, with such instructions ringing in their ears, the jury could only conclude that in taking money from the land Ferguson had acted in bad faith. For no other conclusion could be reconciled with the court's instruction that *the offer to deed the land to the bank* was accepted.

And equally as apparent, the jury had no fair opportunity to pass upon the second requested charge *i. e.*, whether Ferguson intended at the time for Fowler to hold for the bank. Ferguson must necessarily have so intended (the jury undoubtedly reasoned) if, as the judge charged, he accepted Mrs. Berkman's offer to deed the land to the bank. In the minds of the jury and as a matter of logic, these two instructions, could have had no operative effect in securing a fair trial, coming as they did, at the end of a charge which had already inevitably precluded a finding for the defendant on the vital question of fact.

Conclusion.

In a criminal case, therefore, in which liberty and stigma are involved, petitioner received two trials—but not two,

nor even one, fair trial. All he asks is one fair trial—a trial in which the jury are not bindingly instructed that he accepted the land for the bank, and that, as President, he was without power to make Fowler his trustee, a trial in which civil liability is not made an issue for the jury, a trial in which the judge, in his charge, discusses evidence of innocence as well as of guilt.

To preserve the worth of appellate review and the Constitutional right to fair trial, this Court should, even at this last hour, exercise its supervisory power over this case. Petitioner prays only his fundamental right—a trial by jury.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted, and that the petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit be, upon further consideration, granted.

Respectfully submitted.

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WILLIAM D. DONNELLY,
Counsel for Petitioner.

November, 1941.

Certificate of Counsel.

I, William D. Donnelly, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM D. DONNELLY.